



Volume 8 | Issue 2

Article 2

1962

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Richard B. Lillich

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Recommended Citation

Richard B. Lillich, *A Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino*, 8 Vill. L. Rev. 155 (1962).

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WINTER 1962-63]

A PYRRHIC VICTORY AT FOLEY SQUARE: THE SECOND CIRCUIT AND *SABBATINO*

RICHARD B. LILLICH†

THE SECOND Circuit's opinion in *Banco Nacional de Cuba v. Sabbatino*¹ will be received with mixed emotions by those international lawyers who believe that "the poverty and inadequacy of the international remedies make the availability of municipal courts of the greatest importance in providing effective redress for violations of international law."² For while Circuit Judge Waterman, like Judge Dimock in his much-noted District Court opinion,³ refused to apply the act of state doctrine and held that the act in question (a Cuban nationalization decree) violated international law, his reason for finding "an exception to the judicial abnegation required by the act of state doctrine"⁴ comes as a distinct disappointment.

Rejecting Judge Dimock's view that the act of state doctrine does not apply where the validity under international law of the act of a foreign state is challenged, Judge Waterman bases his exception upon three Department of State communications which, while "somewhat ambiguous . . . [,]" express a belief on the part of those responsible for the conduct of our foreign affairs that the courts here should decide the status here of Cuban decrees."⁵ Thus the promising exception introduced by the District Court decision is glossed over and the

† Assistant Professor of Law and Director, International Legal Studies, Syracuse University College of Law; A.B., 1954, Oberlin College; LL.B., 1957, Cornell University; LL.M., 1959 J.S.D., 1960, New York University.

1. 307 F.2d 845 (2d Cir. 1962), petition for cert. filed, 31 U.S.L. WEEK 3095 (U.S. Sept. 4, 1962) (No. 403), views of Solicitor General requested, 83 Sup. Ct. 253 (1962).

2. COMM. ON INT'L LAW, ASS'N OF THE BAR OF THE CITY OF NEW YORK, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS 2 (1959).

3. *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961). An often perceptive but sometimes uneven analysis of the District Court's opinion may be found in Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 RUTGERS L. REV. 1 (1961) (hereinafter cited "Falk"). See also Coerper, *The Act of State Doctrine in the Light of the Sabbatino Case*, 56 AM. J. INT'L L. 143 (1962); Garretson, *International Law*, 1961 ANN. SURVEY AM. L. 1, 23-24; and Comment, 75 HARV. L. REV. 1607, 1614-18 (1962). The District Court decision is noted in 4 ARIZ. L. REV. 78 (1962); 3 B.C. IND. & COMM. L. REV. 282 (1962); 49 CALIF. L. REV. 979 (1961); 47 CORNELL L.Q. 659 (1962); 11 DE PAUL L. REV. 76 (1961); 30 FORDHAM L. REV. 523 (1962); 47 IOWA L. REV. 765 (1962); 60 MICH. L. REV. 231 (1961); 8 N.Y.L.F. 148 (1962); 37 N.Y.U.L. REV. 155 (1962); 110 U. PA. L. REV. 122 (1961); 23 U. PITT. L. REV. 816 (1962); 36 ST. JOHN'S L. REV. 159 (1961); 14 STAN. L. REV. 172 (1961); 13 SYRACUSE L. REV. 165 (1961); and 1962 WIS. L. REV. 386.

4. 307 F.2d at 857.

5. *Id.* at 858.

case handled as one falling under the *Bernstein* approach,⁶ which allows a court to ignore the doctrine only "when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts. . . ."⁷

It is the contention of this writer that the rationale behind the Second Circuit's exception to the act of state doctrine is an unfortunate one, since by substituting executive approval for alleged violation of international law as the basis of the exception to the doctrine the court restricts the role of international law in such disputes, raises complex questions of judicial-executive relations and, as a consequence, decreases the availability of municipal courts to determine upon the merits cases involving acts of foreign states. An assessment of the District Court and Second Circuit opinions supports this contention.

I. BACKGROUND.

Under the so-called act of state doctrine, courts in the United States have refused to inquire into the validity of certain acts of foreign states, whether alleged to violate the municipal law of the foreign state⁸ or the public policy of the United States,⁹ under the theory that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."¹⁰ The doctrine is not a rule of public international law,¹¹ but "a principle of judicial self-restraint and deference to the role of the executive or political branch of government in the field of foreign affairs."¹²

Recently, nationalization decrees of foreign states have given rise to many potential act of state cases. In the typical situation, State A takes the property of an alien located within its territory and transfers it to Y, who then brings the property into State B. If State B applies the act of state doctrine, an action by the former alien owner against Y to recover the property will be dismissed by the courts of State B without a consideration of the validity of State A's taking of the

6. *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954). See Comment, 62 COLUM. L. REV. 1278, 1310 (1962).

7. 307 F.2d at 857.

8. RESTATEMENT, FOREIGN RELATIONS § 42 (Proposed Official Draft, 1962). See text at notes 25 & 120 *infra*.

9. RESTATEMENT, FOREIGN RELATIONS § 43 (Proposed Official Draft, 1962). See text at notes 26 & 121 *infra*.

10. *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 84 (1897). See generally RE, FOREIGN CONFISCATIONS chs. 3, 5, 11 (1951).

11. RESTATEMENT, FOREIGN RELATIONS, Explanatory Notes § 41, comment g at 134 (Proposed Official Draft, 1962). The International Law Association adopted this position by an overwhelming vote at its Brussels Conference in August, 1962.

12. COMMITTEE ON THE JURIDICAL ASPECTS OF NATIONALIZATION AND FOREIGN PROPERTY, AMERICAN BRANCH, INTERNATIONAL LAW ASSOCIATION, REPORT ON THE "ACT OF STATE" DOCTRINE 3 (Brussels Conference, 1962).

property. Some courts¹³ and most writers,¹⁴ however, have taken the position that the act of state doctrine does not preclude the examination of the validity of foreign nationalization decrees *under international law*.¹⁵

The latter position was advocated in 1959 in a well-known report by the Committee on International Law of the Association of the Bar of the City of New York.¹⁶ Relying heavily upon this report, the tentative draft of the Restatement of the Foreign Relations Law of the United States adhered to this view the following year.¹⁷ Finding that "no American case has raised the question of application of the doctrine . . . when a foreign act of state is charged with being in conflict with, or in violation of, international law,"¹⁸ the Restatement concluded:

In this absence of controlling precedent, courts of the United States would appear to be free to consider on its merits the act of a foreign state charged to be in violation of, or in conflict with, international law. As international law is part of the law of the United States, and applicable directly in its courts, the question whether it has been violated should be considered as a legal question *not subject to suspension in order to prevent embarrassment in the conduct of foreign affairs*.¹⁹

Such was the situation in the United States when Judge Dimock was presented with the facts of *Sabbatino*. From his opinion, which cites the Restatement five times, it is quite apparent that Judge Dimock intended to fit these facts into the framework of the Restatement and supply a "controlling precedent" supporting its position.²⁰

Banco Nacional is not the typical act of state case given above.²¹ Farr Whitlock, a New York commodity broker, entered into contracts for the purchase of sugar with a wholly-owned Cuban subsidiary of

13. A collection of cases may be found in Judge Dimock's opinion, 193 F. Supp. at 380 n.6.

14. *Id.* at 380 n.7.

15. Compare text at notes 8 & 9 *supra*.

16. See note 2 *supra*. The report is commended in Hyde, *The Act of State Doctrine and the Rule of Law*, 53 AM. J. INT'L L. 635 (1959) and criticized in Reeves, *Act of State Doctrine and the Rule of Law — A Reply*, 54 AM. J. INT'L L. 141 (1960).

17. RESTATEMENT, FOREIGN RELATIONS § 28d(2) (Tent. Draft No. 4, 1960).

18. RESTATEMENT, FOREIGN RELATIONS, Explanatory Notes § 28d, comment e at 19 (Tent. Draft No. 4, 1960). This statement has been called "flatly wrong and confusing" by Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. PITT. L. REV. 881, 885 (1962). A later draft of the Restatement modifies the phraseology somewhat. RESTATEMENT, FOREIGN RELATIONS § 43, Reporters' Note at 142-43 (Proposed Official Draft, 1962).

19. RESTATEMENT, FOREIGN RELATIONS, Explanatory Notes § 28d, comment e at 20 (Tent. Draft No. 4, 1960) (emphasis added).

20. This surmise is reinforced by the fact that the issue on which Judge Dimock decided the case apparently was not briefed or argued by either of the defendants. Brief for Petitioner, p. 7 n.1, *Banco Nacional de Cuba v. Sabbatino*.

21. See text following note 12 *supra*.

C.A.V., itself a Cuban corporation over ninety per cent owned by residents of the United States. On the day that the sugar was being loaded aboard ship, C.A.V. was nationalized by the Cuban government. Thereafter, in order to obtain the required consent of the Cuban government to have the loaded ship depart, Farr Whitlock entered into contracts with Banco Para el Comercio Exterior de Cuba, the government's representative, identical in terms with the earlier contracts between Farr Whitlock and C.A.V.'s subsidiary. The ship then departed for Casablanca, Morocco.

The bills of lading for the shipment of sugar were assigned by Banco Para el Comercio Exterior de Cuba to Banco Nacional de Cuba, which in turn sent them to its agent in New York for presentation to Farr Whitlock for payment. The latter accepted the documents, negotiated the bills of lading to its customer and received payment of the purchase price. However, it did not pay the proceeds to Banco Nacional's agent but to Sabbatino, a receiver appointed at the behest of a stockholder of C.A.V. pursuant to Section 977-b of the New York Civil Practice Act.²² Banco Nacional thereupon brought an action in the United States District Court for the Southern District of New York, alleging that Farr Whitlock had illegally converted the bills of lading and the proceeds, and also praying that Sabbatino be enjoined from exercising jurisdiction over the sums paid to him.

As a defense against Banco Nacional's motion for summary judgment the defendants raised the claim, along with others that need not detain us here,²³ that the Cuban decree nationalizing C.A.V.'s property was not enforceable in courts in the United States.²⁴ It was Judge Dimock's consideration and disposition of this claim that has made the *Sabbatino* case the most-discussed international law decision by an American court in recent years.

22. This section, which after September 1, 1963 will be distributed among Sections 1202, 1203, 1207 and 1218 of the New York Business Corporation Law, authorizes the appointment of a receiver for the New York assets of a nationalized foreign corporation. See Comment, *Foreign Nationalization: A Statutory Remedy in New York*, 13 SYRACUSE L. REV. 555 (1962).

23. "Defendants' first claim is that plaintiff lost nothing by Farr Whitlock's failure to pay the draft because the terms of the nationalization decree did not embrace the sugar shipment at issue and plaintiff therefore had no interest in the sugar or the purchase price. Defendants' second claim is that . . . the sugar was located outside of Cuban territory when the decree took effect and hence courts of this country will not recognize the decree's extraterritorial effect." 193 F. Supp. at 378. Judge Dimock rejected both of these claims, *Id.* at 379, and the Second Circuit assumed the correctness of his rulings. 307 F.2d at 854 n.5.

24. If the decree was unenforceable, then courts in the United States would consider C.A.V. the owner of the sugar at the time when Banco Para el Comercio Exterior de Cuba purported to sell it to Farr Whitlock. Therefore Banco Nacional would have no right to enforce, as it attempted to do, the contract of sale.

II. DISTRICT COURT OPINION.

The threshold problem faced by Judge Dimock in determining the enforceability of the Cuban nationalization decree was whether the act of state doctrine precluded judicial inquiry into its validity. With respect to the defendants' argument that the decree was invalid since it had not been published in the Official Gazette of Cuba, the court held that it could "not refuse to enforce the nationalization decree on the ground that it did not comply with the formal requisites imposed by Cuban law. . . ." ²⁵ Nor did the court consider itself "free to refuse enforcement to the nationalization decree because it violates the public policy of the forum." ²⁶

Having thus applied the act of state doctrine, Judge Dimock proceeded to the heart of his opinion:

The crucial question remains, however, whether this court can examine the validity of the Cuban act under international law and refuse recognition to the act if it is in violation of international law. Apparently, no court in this country has passed on the question. ²⁷

Noting that "foreign forums have evidenced some willingness to examine the validity of foreign acts under international law," the court acknowledged that "by far the strongest support for such examination has come from legal commentators and textwriters." ²⁸ After balancing the reasons for refusal to examine the validity under international law of the Cuban decree against the reasons supporting such examination, Judge Dimock reached the "inescapable . . . conclusion"

25. 193 F. Supp. at 379, citing RESTATEMENT, FOREIGN RELATIONS § 28d(1) (Tent. Draft No. 4, 1960). See RESTATEMENT, FOREIGN RELATIONS § 42 (Proposed Official Draft, 1962).

26. 193 F. Supp. at 379-80. See RESTATEMENT, FOREIGN RELATIONS § 43 (Proposed Official Draft, 1962). Garretson has argued that "the result [in *Sabbatino*] might have been better reached if the court had avoided . . . the act of state doctrine and in accordance with the basic conflict of laws principle, simply refused to give effect to foreign acts which produce results contrary to the public policy of the forum." Garretson, *op. cit. supra* note 3, at 24. See also Note, 37 N.Y.U.L. REV. 155, 160 (1962) and Note, 1962 WIS. L. REV. 386, 392. Falk, who has urged "respect for foreign economic acts of state . . . to keep pure the role of domestic courts as agents of the horizontal international legal order . . .," FALK, JURISDICTION, IMMUNITIES, AND ACT OF STATE: SUGGESTIONS FOR A MODIFIED APPROACH, IN ESSAYS ON INTERNATIONAL JURISDICTION 14 (1961), adopts a "preferred position" attitude toward foreign governmental acts seriously abridging fundamental human rights, suggesting that in such cases the courts create "a limited public policy exception to the standard practice of deference." Falk 33. Compare COMM. ON INT'L LAW, ASS'N OF THE BAR OF THE CITY OF NEW YORK, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS 6-8, 11-12 (1959).

27. 193 F. Supp. at 380, citing RESTATEMENT, FOREIGN RELATIONS § 28d(2) and comment c (Tent. Draft No. 4, 1960). See text at and accompanying note 18 *supra*.

28. 193 F. Supp. at 380.

that "the decree in the present action is subject to examination in the light of the principles of international law."²⁹

Whether one views Judge Dimock's opinion as constituting a "restriction of the act of state doctrine"³⁰ or a refusal "to extend the act of state doctrine"³¹ depends upon one's view of the prior state of the law.³² That debate will not be reopened here. What is more important is ascertaining Judge Dimock's reason for deeming himself free to examine the validity under international law of the Cuban decree. Was he adopting the Restatement position allowing the examination of foreign acts of state allegedly violating international law?³³ Or was he conditioning his examination of the Cuban decree upon the tacit acquiescence of the Department of State — manifested in three diplomatic notes declaring the Cuban nationalization measures to be violative of international law?³⁴ Judge Dimock's approach to *Sabbatino* strongly suggests the first alternative, although his opinion does not expressly adopt the Restatement's tentative position.³⁵ Indeed, by raising and then rejecting one possible reason for refusing to examine the validity under international law of the Cuban decree — the desire not to embarrass the executive in its conduct of foreign relations — the court resurrects the ghost of *Bernstein*.

Under what may be called the "green light" theory of the *Bernstein* cases,³⁶ a court will apply the act of state doctrine unless it is shown by "positive evidence" that it is the "positive intent" of the

29. *Id.* at 382.

30. Comment, 75 HARV. L. REV. 1607, 1615 (1962).

31. Coerper, *supra* note 3, at 145.

32. Metzger, for instance, would take the position that the opinion restricts the doctrine, since he believes it applies "even if the validity of the act of the foreign state is sought to be re-examined because it is deemed to be in violation of international law." Metzger, *supra* note 18, at 884. The Association of the Bar of the City of New York, on the other hand, would view the opinion as a refusal to extend the doctrine, since the Association has stated that "the available precedents do not require the conclusion that United States courts are barred from examining the validity of foreign acts of State in violation of international law." COMM. ON INT'L LAW, ASS'N OF THE BAR OF THE CITY OF NEW YORK, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS 11 (1959).

33. See note 19 *supra*.

34. 193 F. Supp. at 381 n.11.

35. See text at and accompanying note 20 *supra*. Falk observes that "*Banco Nacional* follows the Restatement approach, although it did assure itself that no executive embarrassment would follow from an inquiry into the status of the Cuban acts under international law." Falk 34. He concludes that "Judge Dimock's view of executive participation [in act of state cases] allows . . . for an initial veto of the normal judicial application of international law." *Id.* at 25 n.90. To the extent that Judge Dimock's opinion is interpreted as permitting "affirmative executive policy" to act as a "check" upon a court's ability to pass upon the validity under international law of foreign acts of state (*Id.* at 22, 23 n.83), it cannot be squared with the tentative draft of the Restatement, which considered a court's jurisdiction in such situations "not subject to suspension in order to prevent embarrassment in the conduct of foreign affairs." See note 19 *supra*. For reasons given in the text below, this writer does not accept Falk's analysis of Judge Dimock's opinion on this point. See text at notes 40-52 *infra*.

36. See note 6 *supra*.

Department of State to relax the doctrine's application.³⁷ In the second *Bernstein* case, which has been called "the only case in which the State Department has suggested to a court that it could ignore or should ignore the Act of State Doctrine,"³⁸ a letter to plaintiff's counsel published in the form of a Department of State press release, expressing no objection to judicial consideration of the foreign act of state, was held to constitute sufficient evidence of such intent.³⁹ Having received the green light, the Second Circuit in *Bernstein* proceeded to dispose of the case on its merits.

Was Judge Dimock using the *Bernstein* precedent in *Sabbatino* when he cited the three Department of State notes? A close reading of his opinion points to a negative answer. As demonstrated above, Judge Dimock was operating within the Restatement frame of reference,⁴⁰ and the tentative draft of the Restatement clearly rejected the green light theory when the foreign act of state allegedly violated international law.⁴¹ Even if the three diplomatic notes cited in *Sabbatino* constituted sufficient "positive intent" to permit the use of the *Bernstein* approach,⁴² which is debatable,⁴³ there is nothing in the opinion indicating that the court used them for this purpose.⁴⁴ Having considered the "basic reason" for judicial refusal to examine the validity of foreign acts of state — "a wise recognition of and respect for the sovereignty of each state within its own territory"⁴⁵ — and dismissed it as inapplicable to

37. 163 F.2d at 251.

38. PROCEEDINGS, THIRD SUMMER CONFERENCE ON INTERNATIONAL LAW, CORNELL LAW SCHOOL 105 (1960) (hereinafter cited "PROCEEDINGS").

39. 210 F.2d at 376.

40. See text at note 20 *supra*.

41. RESTATEMENT, FOREIGN RELATIONS, Explanatory Notes § 28d, comment e at 20 (Tent. Draft No. 4, 1960). Compare RESTATEMENT, FOREIGN RELATIONS, Explanatory Notes § 44, comment b at 145 (Proposed Official Draft, 1962).

42. "It is felt that a model for this decision could have been found in the *Bernstein* litigation." Note 3 B.C. IND. & COMM. L. REV. 282, 285 (1962). See also Note, 60 MICH. L. REV. 231, 233 (1961).

43. One notewriter construes *Sabbatino* as a liberalized version of *Bernstein*, with the requirement of "positive evidence" of "positive intent" being met by something less than express executive approval. Note, 30 FORDHAM L. REV. 523, 528-29 (1962). See also Note, 8 N.Y.L.F. 148, 153 (1962). As Falk ably demonstrates, "an external intergovernmental note of protest sent to the Cuban government is not equivalent to an internal mandate specifically directed at American domestic courts . . ." Falk 22. Therefore, if one assumes that Judge Dimock was following *Bernstein*, it is correct to conclude that he misused, or at least misread, those cases. *Id.* at 23. This article rejects that assumption, and with it much of Falk's criticism of Judge Dimock's opinion. Falk's analysis is extremely incisive, however, when applied to Judge Waterman's Second Circuit opinion. See text at and accompanying notes 104-114 *supra*.

44. *Quaere*: if the District Court was following *Bernstein*, why did it devote three pages of its opinion to the consideration of policy factors underlying a question it believed "no court in this country has passed on . . ." 193 F. Supp. at 380. Surely a short paragraph citing *Bernstein* would have been adequate had the court been so disposed.

45. 193 F. Supp. at 381.

the *Sabbatino* situation,⁴⁶ Judge Dimock proceeded to demonstrate why another reason for the rule also was without merit.

Judicial refusal to inquire into the validity of an act of a foreign state has also been due to a desire not to embarrass the Executive in its conduct of foreign relations. See *Bernstein v. Van Heyghen Freres S. A.*, 2 Cir., 163 F. 2d 246, certiorari denied 332 U. S. 772, 68 S. Ct. 88, 92 L. Ed. 357. The United States State Department has, however, delivered a note to the Cuban Government declaring the very nationalization law which plaintiff seeks to enforce to be in violation of international law. It can scarcely be believed therefore that judicial examination of the decree in the light of international law would embarrass the Executive.⁴⁷

Bernstein is cited by the court as a judicial articulation of one reason often urged in support of the act of state doctrine, and the Department of State notes are used to demonstrate that this reason disappears when the act in question violates international law. While the passage indicates an awareness of executive sensitivity,⁴⁸ the extract, by itself and in the context of the entire opinion, does not support the conclusion that the court was following the green light approach.⁴⁹ Nor is there anything in it to warrant the statement that the case "explicitly allows the executive view of foreign affairs to act as a potential check upon the scope of normal review."⁵⁰ What role, if any, the executive should play in act of state cases was left unsaid. The conclusion seems inescapable, then, that the court "chose to break new ground by basing its holding on the proposition that the 'act of state' doctrine does not bar examination of foreign acts of state where such

46. "The basis for such recognition and respect vanishes, however, when the act of a foreign state violates . . . the standards imposed by international law. There is an end to the right of national sovereignty when the sovereign's acts impinge on international law." *Ibid.*

47. 193 F. Supp. at 381.

48. "Since the Executive position was clearly stated, it can be concluded that the court did not totally discard the rationale designed to prevent embarrassment of the Executive Branch." Note, 47 Iowa L. Rev. 765, 770 (1962). See also RESTATEMENT, FOREIGN RELATIONS, Explanatory Notes § 43, Reporters' Note 3 at 143 (Proposed Official Draft, 1962).

49. See text at and accompanying notes 42 & 43 *supra*.

50. Falk 23 n.83 (emphasis added). While the opinion is somewhat less than precise at this point, it certainly does not "explicitly" uphold the assertion in the text. Falk also concludes that "Judge Dimock stated that a court should not review the validity of a foreign act of state under international law unless it is clear that such review will not 'embarrass the Executive in its conduct of foreign relations.'" *Id.* at 21. (emphasis added). Judge Dimock made no such statement, as a glance at that part of his opinion from which the nine word quotation was taken indicates. See text at note 47. It may well be that Judge Dimock assumed the possibility of an "executive veto" in cases like *Sabbatino*, but he never explicitly stated his views on the question.

acts violate international law."⁵¹ The Proposed Official Draft of the Restatement so interprets the District Court opinion.⁵²

Having concluded that the Cuban nationalization decree was subject to examination under international legal standards, the court held that the decree was "a patent violation of international law"⁵³ because: (1) it was not reasonably related to a public purpose; (2) it discriminated against United States nationals; and (3) it did not provide adequate compensation.⁵⁴ This article will not explore the court's determination of the substantive international law issue, except to note that Judge Dimock considered it one for the court. Observing that the Department of State had previously declared the decree to be in violation of international law,⁵⁵ he added that "the facts and law of the case, irrespective of that determination of the Executive, require the same conclusion by the Judicial [sic] with regard to the decree."⁵⁶ Thus, as Falk states, "it would be incorrect to attribute the result in *Banco Nacional* to judicial abdication in the face of executive policy."⁵⁷

In sum, the District Court's decision in *Sabbatino* staked out a large area where, without the necessity of executive permission, the act of state doctrine was not to apply. The decision thus avoided making the courts mere "conduits for the fulfillment of executive policy,"⁵⁸ while at the same time raising hopes "that individuals injured by foreign acts of state in violation of international law might more often obtain a day in court."⁵⁹ The increased availability of municipal courts, in turn, would contribute to an international consensus on such questions as nationalization. The Second Circuit's decision, while affirming the judgment of the District Court, represents an unfortunate retreat on all these points.

51. Note, 60 MICH. L. REV. 231, 233 (1961).

52. See RESTATEMENT, FOREIGN RELATIONS, Explanatory Notes § 43, Reporters' Note 3 at 143 (Proposed Official Draft, 1962), stating that the opinion "tends to support an exception to the doctrine where the act of a foreign state is challenged under international law, but also involves executive indications related to § 44 [which restates *Bernstein* approach]." A comment to section 44 notes that "it is possible but not certain that courts in the United States will develop an exception to the act of state doctrine, independent of the rule stated in this Section, where a violation of international law is charged." RESTATEMENT, FOREIGN RELATIONS § 44, comment b at 145 (Proposed Official Draft, 1962).

53. 193 F. Supp. at 386.

54. 193 F. Supp. at 384-86.

55. 43 DEP'T STATE BULL. 171 (1960).

56. 193 F. Supp. at 384.

57. Falk 16. He cautions, however, that domestic courts "tend to invoke norms that correspond with the national preference. *Banco Nacional* is itself an illustration of institutionalized bias." *Id.* at 10.

58. *Id.* at 25 n.90.

59. COMM. ON INT'L LAW, ASS'N OF THE BAR OF THE CITY OF NEW YORK, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS 15 (1959).

III. SECOND CIRCUIT OPINION.

The Court of Appeals, after rejecting Farr Whitlock's argument that the jurisdiction of the District Court was defective,⁶⁰ turned its attention to the act of state doctrine, which it acknowledged was "one of the conflict of laws rules applied by American courts" and "not itself a rule of international law."⁶¹ Citing numerous cases where courts of other countries have inquired into the legality of steps taken by foreign sovereigns,⁶² the court then traced the history of the doctrine in American jurisprudence⁶³ and listed instances where it has been recognized and applied by the Second Circuit and other courts.⁶⁴ Then Judge Waterman reached the heart of his opinion, the rationale behind the Second Circuit's exception to the act of state doctrine.

However, when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen and has been recognized both in this circuit and elsewhere. In *Bernstein v. N.V. Nederlandsche - Amerikaansche Stoomvaart - Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (*per curiam*), when we received word from the State Department that it was State Department policy to permit American courts to pass on the validity of acts done by Nazi officials, our court rescinded its earlier mandate based upon the act of state doctrine, preventing the district court from questioning the validity of the acts of the German Nazi government. See 173 F.2d 71 (2d Cir. 1949). . . .

This exception is applicable to the case before us. While the case has been pending we have been enlightened, as the court was in the *Bernstein* case, *supra*, as to the attitude of the Department of State. . . . These statements are somewhat ambiguous, perhaps intentionally so. But at the least they express a belief on the part of those responsible for the conduct of our foreign affairs that the courts here should decide the status here of Cuban decrees.⁶⁵

The import of the above passage is obvious. The Second Circuit has slapped *Sabbatino* into the *Bernstein* mold.⁶⁶ Rejecting by implica-

60. 307 F.2d at 854.

61. *Id.* at 855. See text at and accompanying note 11 *supra*.

62. *Id.* at 855 n.6.

63. *Id.* at 855-857.

64. *Id.* at 857. Among the cases listed were the first *Bernstein* decision, note 6 *supra*, and *Republic of Cuba v. Pons*, 294 F.2d 925 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 960 (1962), 39 U. DER. L.J. 125 (1961), 13 SYRACUSE L. REV. 327 (1961). See Garretson, *op. cit. supra* note 3 at 24-25 and text accompanying note 115 *infra*.

65. 307 F.2d at 857-858. [emphasis added.]

66. The possibility of such an approach has been recognized. See text at and accompanying notes 42-43 *supra*. Compare Note, 47 IOWA L. REV. 765, 774 (1962): "The fact that the Executive Branch had previously denounced the decree in question

tion the promising exception introduced by Judge Dimock and commented upon by the Proposed Official Draft of the Restatement,⁶⁷ the Court of Appeals has applied the act of state doctrine, and with it the *Bernstein* exception, to cases where the validity of the foreign act is challenged under international law. The fact that the court perceived the Department of State's green light (albeit through a glass, darkly), not the fact that the Cuban decree was alleged to violate international law, operated to permit the consideration of the case on its merits. While the Second Circuit reaches the same result as the District Court, its reasoning is far less satisfactory.

In the first place, Judge Waterman's opinion "extends" rather than "restricts" the scope of the act of state doctrine.⁶⁸ The court implies that, absent Department of State consent, the doctrine would apply. Hence a broad exception based upon an alleged violation of international law is replaced by a narrow exception conditioned upon the wishes of the executive. As Metzger, a supporter of the approach adopted by the Court of Appeals, has observed, "it is unlikely that there would be many cases in which the State Department would convey directly to a court such a 'supervening expression of Executive policy.'"⁶⁹ Although the Department of State apparently has decided that the Cuban nationalization decrees should be subject to judicial inquiry,⁷⁰ there is no assurance that this position will be maintained in the future with respect to other foreign acts of state, whether involving nationalizations or not.⁷¹

This injection of political considerations into the judicial process, which allows the Department of State to change a lawsuit's "outcome by putting the executive thumb on the scales,"⁷² is rationalized on the ground that the wholesale examination of foreign acts of state under international law might upon occasion embarrass the executive in its

should not be seized upon by courts in the future as a basis for distinguishing the decision in the instant case."

67. See text accompanying note 52 *supra*.

68. See text at and accompanying note 32 *supra*.

69. Metzger, *supra* note 18, at 890. Elsewhere he has stated that "except in the very odd situation, the Act of State Doctrine would be applied lock, stock, and barrel, as it has been. . . . As I visualize it, the upshot of the existing law is that Act of State Doctrine will apply, except in a very odd case and very infrequently." PROCEEDINGS 105.

70. But see text accompanying note 98 *infra*.

71. Or even, for that matter, with regard to the Cuban decrees. Fisher, answering Metzger, note 69 *supra*, has pointed out that "if there is another change of government in Cuba, the titles to sugar will depend upon whether it [examination of the decrees] is vexing or not. I take it that the notion is that how the case should come out should be a political decision. If the litigation is going to be harassing, let the State Department say so. Let us not have a rule just so 'we diplomats, who know how these things ought to be run, can decide the matter.'" PROCEEDINGS 105.

72. *Id.* at 104 (Fisher).

conduct of foreign affairs.⁷³ This argument, one of the most overrated in the annals of American legal history,⁷⁴ is no more appealing in the context of the act of state doctrine than it is when the question of sovereign immunity is involved.⁷⁵ The question of whether a foreign act of state violates international law, like the issue of sovereign immunity, is a juridical question, and "the duty of the courts to render a decision on the merits should not be subordinated to political considerations on no more solid grounds than exaggerated apprehension of national prejudice to the conduct of United States foreign rela-

73.

My own feeling on the matter is that the present posture of the law as reflected in the second *Bernstein* case, namely, that the Act of State Doctrine of judicial abstention will apply unless the State Department indicates to the court that foreign relations, in effect, will not be vexed and that, consequently, it is appropriate, in the Department's view, for the court to go to the merits, this present state of the law is just about where the law ought to be.

This, it seems to me, derives from the basic rationale of the Doctrine, which is a foreign relations doctrine. The courts say, in effect, 'Since our judging of a foreign act affecting persons or property within a foreign country's jurisdiction could lead to foreign relations vexation, we, the court, do not feel confident that we will be able to make a judgment on that vexatious question; since the political arm of the government, which is supposed to be cognizant of the foreign relations implications, is best able to give a judgment on that, we will abstain, unless we get a statement from the foreign relations arm of the government that it is all right that we proceed, their having taken into account foreign relations considerations.' *Id.* at 84 (Metzger).

74. "Stan Metzger presented the viewpoint of 'embarrassing the executive department by a court decision.' Can you give me a single case, in the whole history of the United States, where the government was embarrassed by a court decision? They are embarrassed by many other things." *Id.* at 15 (Domke).

75. Metzger, who also urges judicial deference to the executive in sovereign immunity cases, once again, bases his argument upon considerations of possible executive embarrassment. *Id.* at 12. Through a series of judicial decisions and executive pronouncements, it has now become firmly established that American courts, in the interest of smooth foreign relations, will grant sovereign immunity if the claim is "recognized and allowed" by the Department of State. See generally Lillich, *The Geneva Conference on the Law of the Sea and the Immunity of Foreign State-Owned Commercial Vessels*, 28 GEO. WASH. L. REV. 408, 412-15 (1960). Conversely, where the Department of State has refused to suggest immunity when asked, this silence is treated for all practical purposes as a finding of no immunity. Lillich, *A Case Study In Consular and Diplomatic Immunity*, 12 SYRACUSE L. REV. 305, 314-15 (1961).

While many writers have criticized this "judicial abdication" by the courts, *Id.* at 314 n.58, until recently there was no indication that the courts believed themselves bound by Department of State pronouncements. As Judge Fahy stated, the suggestion of the executive "isn't conclusive. It isn't a question of taking away jurisdiction. It is comity. It is a statement of views emanating as it does, in the field of international competence, in the State Department, that is entitled to great consideration and deference on the part of the courts." PROCEEDINGS 136 (emphasis added). See RESTATEMENT, FOREIGN RELATIONS § 75(2) (Proposed Official Draft, 1962).

Several years ago, however, a representative of the Department of State advanced the idea that under the separation of powers doctrine the courts were constitutionally required to follow the Department's advice. PROCEEDINGS 4. Since then courts have decided that the Department's determination was "conclusive" upon them, *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 301, 204 N.Y.S.2d 971, 974 (Sup. Ct. 1960), 12 SYRACUSE L. REV. 270 (1960), and that once the Department had spoken the "court was without further jurisdiction of the case. . . ." *Republic of Cuba v. Dixie Paint & Varnish Co.*, 104 Ga. App. 854, 123 S.E.2d 198 (1961).

The ultimate step in the development of this pseudo-constitutional theory was taken in *Rich v. Nariena Yacuba S.A.*, 295 F.2d 24 (4th Cir. 1961), 50 CALIF.

tions."⁷⁶ In addition, toleration of executive intervention, as Falk warns, "is itself a deprecation of the commitment to international law. It undermines the prestige of international law in domestic courts if its application depends upon a prior political authorization."⁷⁷

A corollary to the embarrassment argument, noted but not developed in Judge Waterman's opinion,⁷⁸ is the contention that permitting courts to pass upon the validity under international law of foreign acts of state

would in all likelihood actually hinder the kind of government-to-government negotiation for a settlement which, if recent history is any indication, is the most effective way to secure the maximum compensation obtainable, and to distribute it equitably.⁷⁹

L. REV. 559 (1962), 13 SYRACUSE L. REV. 492 (1962), which bids fair to become the international legal monstrosity of American courts for the 1960's. See Garretson, *op. cit. supra* note 3, at 25-26. Among other issues raised in *Rich* was the question whether a Cuban state-owned commercial vessel was entitled to sovereign immunity. The Department of State, by telephone and hastily-drafted letter, informed the court that the prompt release of the vessel would avoid disturbance to our foreign relations. Despite the fact that the Department had urged the restrictive theory of sovereign immunity in the 1952 Tate Letter (26 DEPT STATE BULL. 984 [1952]) and had fought successfully for its adoption at the 1958 Geneva Conference on the Law of the Sea (Convention on the Territorial Sea and the Contiguous Zone, U.N. Doc. No. A/Conf. 13/L. 52 [1958], reprinted in 52 AM. J. INT'L L. 834 [1958]), the court held that the Department's abrupt turnabout "should be accepted by the court without further inquiry. . . . We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion." 295 F.2d at 26. But see Comment, 75 HARV. L. REV. 1607, 1611 (1962).

The behavior of the Department in the *Rich* case underscores the validity of Timberg's observation that "there is pressure on the State Department to determine legal issues on the basis of diplomatic relations and temporary political expediency." Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U.L. REV. 109, 128 (1961). For another example of political considerations governing Department decisions, see Note, 50 CALIF. L. REV. 559, 565 n.40 (1962). Yet courts, fearful of "embarrassing" the executive in its conduct of foreign affairs, continue to defer to the Department on this wholly legal issue. Indeed, a Florida appellate court recently held that a Cuban governmental agency was entitled to a writ of mandamus compelling a lower court judge to perform his "clear legal duty to enter an order recognizing the suggestion of sovereign immunity. . . ." *State ex rel. Nat'l Institute of Agrarian Reform v. Dekle*, 137 So. 2d 581, 583 (Fla. 1962).

As Stevenson notes, "we have been too concerned in many aspects of this question with the extent to which judicial decisions could embarrass the executive. I think that in many of these areas . . . if you can find that what has previously been called a political question is a judicial question, and let the courts handle it, that, far from increasing international tension and embarrassing the executive, it will actually reduce international tension." PROCEEDINGS 72.

76. COMM. ON INT'L LAW, ASS'N OF THE BAR OF THE CITY OF NEW YORK, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS 11 (1959).

77. Falk 24. On a more theoretical level, he contends that executive intervention "relegates the role of domestic courts as agents of a nascent international legal order to the marginal circumstance where political considerations bearing on the controversy are ambiguous or non-existent." *Id.* at 20. See text at notes 69-71 *supra*.

78. 307 F.2d at 857. See *Ræ*, *op. cit. supra* note 10, at 75-79.

79. Metzger, *supra* note 18, at 892. See also Falk 30, 32; Comment, 75 HARV. L. REV. 1607, 1616 (1962).

There is a certain plausibility in this argument. In the absence of available international remedies, often the only avenue of redress open to a person who has been injured by the wrongful act of a foreign state is the diplomatic espousal of his claim by the Department of State.⁸⁰ When the wrong arises from the nationalization of property, it is most likely that his claim, along with those of many other claimants, will be handled by means of a lump sum settlement between the United States and the foreign country.⁸¹ In the post-war period, lump sum settlements have been received from the communist countries of Yugoslavia, Rumania and Poland,⁸² and in all probability such a settlement will be negotiated someday with the Republic of Cuba.⁸³ While these settlements only partially compensate claimants for the loss of their property,⁸⁴ they are a method of securing some redress and thus are generally favored by claimants.⁸⁵ "This traditional method of settlement is impaired," it is argued, "when a foreign municipal court attempts to give relief by passing judgment on the contested official act of the government."⁸⁶

Is it really impaired? No categorical answer can be given, *Sabbatino* being the first American case where the act of state doctrine has not been applied and the claimant relegated to "the poverty and inadequacy of the international remedies. . . ."⁸⁷ If, as some assert, "negotiations through diplomatic channels are unlikely to result in prompt or adequate relief,"⁸⁸ it would seem that there is little to impair. In *Sabbatino*, for instance, Judge Waterman observes with respect to the Cuban nationalization decrees that "no aid appears to be available through diplomatic channels to the injured parties."⁸⁹ Even if the situation with respect to Cuba had not reached rock bottom, it is doubtful whether one or more judicial decisions passing upon the international legal validity of the Cuban decrees would have made much difference. Certainly the court's action in *Rich*⁹⁰ did not seem to improve the diplomatic climate to any great degree, and the application

80. LILICH & CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION ch. 6 (1962).

81. LILICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 10, 102 (1962).

82. *Id.* at 9-10.

83. *Id.* at 103.

84. *Id.* at 105-09.

85. *Id.* at 117-18.

86. Falk 27.

87. COMM. ON INT'L LAW, ASS'N OF THE BAR OF THE CITY OF NEW YORK, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS 2 (1959). Falk himself recognizes the weakness of international remedies. Falk 2 n.3.

88. Comment, 75 HARV. L. REV. 1607, 1618 (1962).

89. 307 F.2d at 868-869. The Department of State, while receiving claims for eventual action, is not espousing individual claims against Cuba nor negotiating for their settlement by a lump sum. LILICH & CHRISTENSON, *op. cit. supra* note 80, at 2.

90. See note 75 *supra*.

of the act of state doctrine in the *Pons* case⁹¹ also had little observable effect. Lump sum settlements, being politically negotiated compromises, involve many practical considerations,⁹² but with one exception there is little evidence that the position of municipal courts has been an important factor during negotiations.⁹³

Even assuming that the possibilities of executive embarrassment and of hindrance to claims negotiations justify handling cases like *Sabbatino* under the *Bernstein* approach, serious problems are presented by the manner in which the Second Circuit went about searching for the necessary green light. The first *Bernstein* case, it will be recalled, indicated that the court would relax its application of the act of state doctrine upon the showing by "positive evidence" that it was the "positive intent" of the Department of State to permit such relaxation.⁹⁴ This "definitive expression of Executive Policy," as it was referred to in the second *Bernstein* case,⁹⁵ was satisfied there by a letter to plaintiff's counsel expressing no objection to judicial examination of the foreign act of state.⁹⁶ If one views Judge Dimock's District Court opinion as an application or misapplication of the *Bernstein* approach,⁹⁷ then the three diplomatic notes declaring the Cuban decrees violative of international law must constitute the green light. Falk, assuming for purposes of argument the wisdom of judicial deference, contends that these notes do not constitute the express mandate required by the *Bernstein* precedent. "Why," he asks, "should a domestic court pay any attention whatsoever to a note that passes between states on a diplomatic level?"⁹⁸

91. See note 64 *supra*.

92. LILlich, *op. cit. supra* note 81, at 106-09.

93. In *Stephen v. Zivnostenska Banka*, 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1st Dep't 1961), the Department of State, in a suggestion of sovereign immunity made to a court with respect to certain assets claimed by Czechoslovakia, indicated that the Czech Government, if its claim of immunity was not granted, intended to deduct the amount of these assets from the pending lump sum settlement of Czech nationalization claims. *Id.* at 118-19, 222 N.Y.S.2d at 136. Timberg notes that this deduction, assuming that it was agreed upon by United States negotiators, "probably amounts at most to 4 or 5 mills on each dollar of provable claims. . . ." Timberg, *Expropriation Measures and State Trading*, 55 Proc. Am. Soc'y Int'l L. 113, 120 (1961).

94. 163 F.2d at 251.

95. 210 F.2d at 375.

96. *Id.* at 376.

97. See note 43 *supra*. This writer, once again, does not.

98. Falk 15. The brief filed by the Solicitor General on behalf of the Secretary of State in the *Rich* case, note 75 *supra*, demonstrates why general pronouncements are an untrustworthy guide for judicial conduct under the green light theory. For there the Solicitor General advocated the application of the act of state doctrine, contending that "it would not be inconsistent for the State Department to challenge the validity of the Cuban expropriation under international law, and at the same time to accept the validity of the confiscation of American property located in Cuba, so far as our domestic courts are concerned." Quoted from Brief for Petitioner, p. 26, *Banco Nacional de Cuba v. Sabbatino*. The extract is also quoted in Baade, *The Validity of Foreign Confiscations: An Addendum*, 56 Am. J. Int'l L. 504, 506 (1962). It shows quite clearly that the executive branch did not intend the three

Judge Waterman's Second Circuit opinion openly follows the *Bernstein* cases but omits reference to the three diplomatic notes. Instead, the court sees its green light in three off-the-record pieces of correspondence. The first of these is a letter from the Legal Adviser of the Department of State to counsel for the amici curiae in the case, two sugar companies. The court quotes this letter as follows:

"The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter. *Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine.* Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction." (Emphasis added.)⁹⁹

The second communication relied upon by the court, from the Under Secretary of State for Economic Affairs to counsel for the amici curiae, stated only that the letter writer, the Legal Adviser and the Secretary of State all agreed that "'the Department should not comment on matters pending before the courts.'"¹⁰⁰ Lastly, the court quotes a telegram sent by the Department to litigants in a Florida state court action involving the Cuban nationalization decrees: "'Effect in U.S. of Decrees, etc. of Castro regime is question for court in which case heard.'"¹⁰¹

Judge Waterman acknowledges that the above three statements "are somewhat ambiguous, perhaps intentionally so," but he concludes that "at the least they express a belief on the part of those responsible for the conduct of our foreign affairs that the courts here should decide

diplomatic notes to serve as the "definitive expression of Executive Policy" in all act of state cases, if indeed they were ever intended to serve the purpose for which Falk maintains Judge Dimock used them.

99. 307 F.2d at 858. The italicized sentence comes like an ill wind out of the mouth of the Legal Advisor after the intervention by the Department of State in the *Rich* case, note 75 *supra*. Unfortunately, the Department has never deemed comments upon pending cases "out of place."

100. 307 F.2d at 858. This statement must come as a surprise to counsel in many cases, especially to those in *Stephen v. Zivnostenska Banka*, note 93 *supra*.

101. 307 F.2d at 858. The case is *Kane v. Nat'l Institute of Agrarian Reform*, 18 Fla. Supp. 116 (Cir. Ct. 1961), discussed in Bayitch, *International Law, Fifth Survey of Florida Law 1959-1961*, 16 U. MIAMI L. REV. 240, 271-72 (1961). It is ironic to note that, despite the existence of this telegram, the court in *Kane* presumably based its refusal to apply the act of state doctrine upon the alleged violation of international law, following the District Court opinion in *Sabbatino*, and not upon the green light theory. Rather prophetically, in view of Judge Waterman's Second Circuit opinion in *Sabbatino*, Bayitch observed that "with this telegram in hand, the court [in *Kane*] could have completely ignored the act of state doctrine and followed the two *Bernstein* cases." *Id.* at 272.

the status here of Cuban decrees.”¹⁰² Since the Department of State “has expressed a lack of concern as to the outcome of the litigation,”¹⁰³ the court decided that it was free to determine the case on its merits.

The Second Circuit, in using the green light theory, has introduced two modifications to the *Bernstein* approach.¹⁰⁴ First, it finds the required executive approval in informal, off-the-record correspondence — two letters to counsel for the amici curiae and a telegram directed to someone in a pending Florida action. In the second *Bernstein* case executive policy was evidenced by a formal Department of State press release as well as by a letter to counsel.¹⁰⁵ There is good reason to require such a formal pronouncement. Letters to amicus curiae, even if unambiguous, are a haphazard method of communicating executive approval to a court. They are not part of the record. They need not be shown to counsel for the parties. They may be used or withheld to suit the purposes of the recipient. In short, their use in this fashion rubs against the grain of due process.¹⁰⁶

Telegrams and other communications in unrelated litigation are an even more untrustworthy guide for judicial action under *Bernstein*. Assuming, as Judge Waterman does, that executive approval is required before a court may disregard the act of state doctrine, why should approval in one case, even when expressed in general terms, be regarded as approval in all similar cases? The possibility exists that the executive branch may have decided that our foreign affairs permitted an exception in one particular case, while requiring the doctrine's application in all others. And if the executive branch actually has taken different positions in different cases, as it apparently has with respect to actions involving Cuban nationalization decrees,¹⁰⁷ should the court be free to select the executive communication that is called to its attention or fits its purpose?

Here, for instance, Judge Waterman took notice of a “somewhat ambiguous” telegram to a lower state court, while presumably ignoring a flatly contrary statement made by the Department of Justice on behalf of the Secretary of State in a proceeding before the Supreme Court of the United States in the *Rich* case.¹⁰⁸ There, with 5,000 tons of ex-

102. 307 F.2d at 858.

103. *Id.* at 858-59.

104. Banco Nacional de Cuba contends that the case “is clearly distinguishable. We have here no ‘positive evidence’ of an intent by the executive to relax the Act of State doctrine. . . . On the contrary, all we have here is an evident desire on the part of the State Department to avoid taking such a positive position. . . .” Brief for Petitioner, pp. 10-11, *Banco Nacional de Cuba v. Sabbatino*.

105. 210 F.2d at 376.

106. See Brief for Petitioner, pp. 20-21, *Banco Nacional de Cuba v. Sabbatino*.

107. See text at and accompanying notes 98 *supra* and 109 *infra*.

108. See note 75 *supra*. An application for a stay pending application for a writ of certiorari was denied by the Supreme Court during September, 1961.

propriated sugar involved, the Solicitor General strongly argued for the application of the act of state doctrine:

This act-of-state doctrine prevents any inquiry by our courts into the acts of the Cuban Government in Cuba which, in this case, may have resulted in the expropriation or confiscation of sugar or other property owned by petitioner in Cuba.

* * *

This doctrine applies with full force to preclude judicial review, in domestic courts, even where the act of the foreign state is asserted, as here, to be in conflict with or in violation of international law.¹⁰⁹

That Judge Waterman, if informed of this statement, should have taken it into consideration seems too obvious to belabor. What weight he should have given it is another matter. Did it outweigh the telegram in the *Kane* case,¹¹⁰ that telegram having come directly from the Department of State? If so, what about the two letters to counsel for the amici curiae.¹¹¹ Did they not tip the scales against judicial abstention? These questions highlight the difficulty in trying to divine executive policy in a particular case from conflicting pronouncements made in other proceedings. Certainly this departure from *Bernstein* is an unwise one which is bound to inject yet another aspect of uncertainty into act of state cases.

The second modification of *Bernstein* introduced by the Court of Appeals concerns the substance rather than the manner of the executive communication. In *Bernstein*, "positive evidence" of the Department of State's "positive intent" to give the green light was made the *sine qua non* of judicial disregard of the act of state doctrine. The court saw this green light in a formal Department of State communication which stated that its policy was "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."¹¹² The "somewhat ambiguous" statements in *Sabbatino* cast a far weaker light. The Department, specifically stating that any comments by it would be out of place, said only that the effect of the Cuban nationalization decrees was a question for the court. Judge Waterman interprets these statements as allowing the court to ignore the act of state doctrine and decide the case on its merits. An alternative (although admittedly less likely) reading would be that the Department intended the court to apply usual case law,

109. Quoted from Brief for Petitioner, pp. 26-27, *Banco Nacional de Cuba v. Sabbatino*.

110. See text at note 101 *supra*.

111. See text at notes 99-100 *supra*.

112. 210 F.2d at 376.

including the act of state doctrine and the *Bernstein* exception, and in the absence of affirmative executive approval refuse to go into the case's merits.¹¹³ In any event, one may apply Falk's analysis of Judge Dimock's opinion to the opinion of Judge Waterman and conclude that it states "a confusing approach to the relation between executive and judiciary in matters of foreign relations that neither agrees with precedents nor enunciates an acceptable new direction of policy."¹¹⁴

The position of the courts after the Second Circuit's *Sabbatino* seems to be as follows. If the executive branch remains silent, the act of state doctrine will be applied.¹¹⁵ If the executive expressly indicates that the court may consider the case on its merits, under the *Bernstein* approach the court may do so.¹¹⁶ What has been added is a liberal construction of *Bernstein* which sees a green light in a seemingly neutral statement by the executive branch, thus making it much easier for litigants to avail themselves of the *Bernstein* exception. For convenience, this modification of *Bernstein* may be called the *Sabbatino* corollary. Rejecting the presumption that the doctrine applies unless the Department of State specifically advises to the contrary,¹¹⁷ Judge Waterman seems to be establishing a presumption of the green light *when the Department does speak*. This attitude, coupled with the court's acceptance of informal, off-the-record manifestations of the green light, will afford many more litigants a remedy in American courts.

While any modification of *Bernstein* is welcome, certainly the Second Circuit's is less gratifying than the District Court's. For an alleged violation of international law is no longer sufficient to create an exception to the act of state doctrine: some degree of executive intervention, even if in another case, is required. The courts' role as

113. See text at note 109 *supra*.

114. Falk 26.

115. See *Republic of Cuba v. Pons*, note 64 *supra*. In this case the Court of Appeals for the District of Columbia applied the act of state doctrine to a counterclaim by a Cuban national. Since no violation of international law was alleged, the decision is distinguishable from the District Court's opinion in *Sabbatino*. Note, 13 SYRACUSE L. REV. 327, 329 and n.13 (1962). In addition, the Department of State had not responded to the court's invitation to file a brief, so the decision may be distinguished from the Court of Appeals opinion in *Sabbatino* on the ground of no executive approval. In a dissent, Judge Burger interpreted the Department's silence to mean that the court was free to adjudicate the case. 294 F.2d at 927. See Comment, 75 HARV. L. REV. 1607, 1619 (1962). See also text at note 117 *infra*. *Quaere*: could not the court have cited the *Kane* telegram, as did Judge Waterman, and on this basis have refused to apply the doctrine?

116. Since under the Second Circuit's *Sabbatino* a court may find its green light in correspondence made in connection with an entirely different case, other courts then may be able to consider similar cases on their merits. See *quaere* note 114 *supra*.

117. Among others, Metzger (PROCEEDINGS 86-87) and Reeves (*Id.* at 81) have advocated the continuance of this presumption and Fisher (*Id.* at 86) and Stevenson (*Id.* at 89) have opted for its reversal.

conduits of executive policy is thus further solidified, incompatible as that may be with the concept of the rule of law.¹¹⁸

Having decided that it was able to pass upon the merits of the case by taking advantage of the *Bernstein* exception to the act of state doctrine, the court then faced the question of the validity of the Cuban decree. Like the District Court,¹¹⁹ the Court of Appeals took the position that it could not hold the decree invalid because it violated Cuban law¹²⁰ or because it was contrary to American public policy.¹²¹ However, once again like the District Court,¹²² it held that it could inquire into the Cuban "decree's consistency with international rules of law."¹²³ The court thus reached the same three-pronged argument of invalidity raised by Farr Whitlock below: that the decree violated international law because: (1) adequate compensation was not provided; (2) the purpose of the seizure was retaliation against the United States; and (3) the expropriation was discriminatory in operation.¹²⁴

The court's determination of this substantive international law issue need not be fully explored in this article. Prefacing his discussion with the needless dicta that "the law of nations is a hazy concept"¹²⁵ and that "anyone who undertakes a search for the principles of international law cannot help but be aware of the nebulous nature of the substance we call international law,"¹²⁶ Judge Waterman sought to find and apply international law free from "institutionalized bias" or executive pressure.¹²⁷ Stating the traditional international law rule requiring the payment of just compensation,¹²⁸ he also took note that:

Tremendous social and cultural changes are occurring in many parts of the world today. Many countries have acted upon the principle that, in order to carry out desired economic and social

118. A similar trend has been evident in sovereign immunity cases. See text at and accompanying notes 58 and 75 *supra*.

119. See text at and accompanying notes 25-26 *supra*.

120. 307 F.2d at 859.

121. *Ibid.* Taking note of "the admonition that public policy is an 'unruly horse . . .,'" the court concluded that the "decision of this case based upon the public policy of this forum is undesirable because reliance upon such a basis for decision results in a nationalistic, or municipal, solution of a problem that is clearly international." *Ibid.* Thus the court avoids the charge of "institutionalized bias" that might arise from a decision based upon public policy. See text accompanying notes 26 and 57 *supra*.

122. See text at note 29 *supra*.

123. 307 F.2d at 859. The court aptly observes that "although it can be argued that nationalistic prejudice could affect the decision in cases of this sort, it is also often claimed that other biases in various obnoxious forms are present in the minds of judges in other types of cases." *Id.* at 860. Compare text accompanying note 121 *supra*.

124. See text at note 54 *supra*.

125. 307 F.2d at 859.

126. *Id.* at 860.

127. Compare the approach of the District Court at notes 55-57 *supra*. See also text at and accompanying note 129 *infra*.

128. 307 F.2d at 863.

reforms of vast magnitude, they must have the right to seize private property without providing compensation for the taking. They argue that because of the paucity of funds in their governmental coffers, it would be impossible to carry out large-scale measures in the name of social welfare if they had to provide compensation immediately, or even if required of them later. . . . It is commonplace in many parts of the world for a country not to pay for what it takes.¹²⁹

Then, leaning over backward to avoid a "partisan posture,"¹³⁰ he refused to decide the "difficult question" of "whether a government's failure, in and of itself, to pay adequate compensation for the property it takes is a breach of international responsibility. . . ."¹³¹ Instead, he conditioned his holding upon a finding that the Cuban decree was an act of reprisal against the United States which discriminated against United States nationals and therefore violated international law.¹³² The holding, more narrow and limited than that of the District Court,¹³³ is spelled out quite clearly:

Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals, we hold that the decree was in violation of international law.¹³⁴

The decree having violated international law, Judge Waterman reasoned that Banco Nacional de Cuba's title was invalid and therefore affirmed the District Court's dismissal of the complaint.¹³⁵ Both courts thus reached the same destination, although the route taken by the Second Circuit was far less satisfactory.

129. *Id.* at 864. Elsewhere the court speculates that perhaps "international law is not violated when equal treatment is accorded aliens and natives, regardless of the quality of the treatment or the motives behind that treatment." *Id.* at 867. Such statements, coming from an eminent jurist on one of the most-respected courts in the United States, are bound to undercut the Department of State's argument for prompt, effective and adequate compensation in nationalization cases. No further demonstration that the court is free of "institutionalized bias" is necessary.

130. Falk 41.

131. 307 F.2d at 864. Compare Judge Dimock's position, which views the failure to provide adequate compensation as an independent ground for holding the Cuban decrees violative of international law. 193 F. Supp. at 385.

132. 307 F.2d at 868. Judge Dimock also held that the Cuban decrees violated international law on both of these independent grounds. 193 F. Supp. at 384-85.

133. See text at notes 53-54 *supra*.

134. 307 F.2d at 868. Any possible idea that Judge Waterman intended to hold the decrees invalid on three independent grounds is dispelled by his phrasing of the question for decision. *Id.* at 864. See also text at note 130 *supra*, which negates such a possibility.

135. The court rejected the argument that the nationalization decree vested good title to the sugar in Cuba, subject only to a duty to pay compensation for the taking. *Id.* at 869. Compare Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305 (1960) and Wortley, *Indonesian Nationalization Measures — on Intervention*, 55 AM. J. INT'L L. 680 (1961) with Baade, *Indonesian Nationalization Measures Before Foreign Courts — A Reply*, 54 AM. J. INT'L L. 801 (1960) and Baade, note 98 *supra*.

IV. CONCLUSION.

What should be a court's position when faced with an act of state case where the act allegedly violates international law? Three main alternatives, aside from automatic application of the doctrine, stand out:

1. The doctrine should be applied unless the Department of State relieves the court from restraint. This alternative finds support in the *Bernstein* cases, as modified by Judge Waterman's *Sabbatino* corollary.
2. The doctrine should not be applied unless, for foreign policy reasons, the Department of State intervenes and requests its application. This alternative is advanced by the Association of the Bar of the City of New York.
3. The doctrine should not be applied when the act of state in question allegedly violates international law. This alternative is essentially that of the tentative draft of the Restatement as adopted by Judge Dimock's District Court opinion in *Sabbatino*.

By shifting from the third to the first alternative, Judge Waterman changes the basis for the "exception" to the act of state doctrine from alleged violation of international law to executive approval. The role of international law in act of state cases is further reduced by the fact that the substantive question of whether the act violates international law will now not arise in many cases where the Department of State elects not to give the green light. The reintroduction of the executive into the picture, moreover, virtually forecloses the hope, raised by Judge Dimock's opinion, that a forum for the litigation of one type of international law case might be available on a regular basis. Thus, while the Second Circuit did refuse to apply the act of state doctrine in *Sabbatino* and did hold that the Cuban nationalization decree violated international law, its decision, in the view of many international lawyers, will be considered a pyrrhic victory.